Kasai Reiko v Annie Lor Lee Fong & Ors (Public Bank Bhd, intervener)

HIGH COURT (IPOH) — SUIT NO 22–312 OF 2009
LEE SWEE SENG JC
20 AUGUST 2013

Evidence — Adverse inference — Refusal to give evidence — First defendants' refusal — Whether adverse inference ought to be drawn against them — Whether pleadings were substitute for adducing evidence — Whether first defendants' could rely on submission of no case to answer

Evidence — Statement — Statement made under s 112 of the Criminal Procedure Code — Admissibility of statement in civil trial — Whether statement relevant to subject matter of case — Whether first defendants would be prejudiced by admission of statement

Land Law — Indefeasibility of title and interests — Fraud — Whether proved that plaintiff had advanced purchase price of two apartment units that were registered in names of first defendants — Constructive trust — Whether there arose presumption that first defendants were holding units in trust for plaintiff — Whether presumption was rebutted — Whether adverse inference ought to be drawn against first defendants for refusal to give evidence — Whether first defendants' refusal to transfer units back to plaintiff was fraudulent — Whether transfers ought to be set aside — Charge — First defendant had charged one of two units to bank for loan for working capital purpose — Whether bank knew about fraud or was party to conspiracy to defraud plaintiff — Whether bank as chargee or bona fide purchase for valuable consideration was entitled to protection afforded under s 340 of the National Land Code — Whether bank had acquired title to unit

While on holiday in Cameron Highlands, Malaysia, the plaintiff, a retired Japanese woman, had taken an instant liking to living in this area under the Malaysia My Second Home Programme ('MM2H'). She thus made retirement plans to buy two apartments: one to stay in and one to let out and receive rental income. The plaintiff befriended the second defendant, who also hailed from Japan, and he introduced her to two new apartments that were for sale in the hotel that she was staying in. The second defendant informed the plaintiff that without a visa under the MM2H she could not purchase the apartments. He then introduced the plaintiff to Annie Lor Lee Fong, defendant 1(a). The plaintiff claimed that arrangements were then made for defendant 1(a) and her

son, defendant 1(b), to buy two units in the Greenhill Resort Apartment ('the resort'), in their names for the benefit of the plaintiff. The purchase price of the two units was RM205,000 and RM228,100 respectively. At the same time the second defendant had also convinced the plaintiff to buy a third unit in the same resort. The plaintiff claimed that she had paid the second defendant the total sum of RM611,800 to buy the three apartment units in the resort. Subsequently, the plaintiff discovered from the Honorary Advisor to the Penang State Government's Tourism Action Council that there was no prohibition against her purchasing the apartments in her name if the purchase price was more than RM150,000. The plaintiff then asked for the strata titles in the two units, which were in the name of the first defendants, to be transferred to her name but the two first defendants refused. As for the third unit, the sale was not effected at all and the second defendant who could not be contacted had most likely absconded. The plaintiff lodged a caveat over the two units and commenced the instant suit wherein she prayed inter alia for a declaration that she was the rightful owner of the two units, damages for fraud against the defendants and damages for breach of trust as constructive trustees against the two first defendants. As one of the two units had been charged to Public Bank Bhd for a loan for working capital, the bank applied to intervene. At the trial the plaintiff provided documentary evidence of receipts or evidence of transfer from her bank account to the second defendant. The plaintiff also testified that defendant 1(a) had broken into one of the two units and started letting out the same to tourists. The plaintiff also claimed that she had made 4 police reports as to how she had been cheated by the first defendants. The Investigating officer ('IO') gave evidence of his interview of defendant 1(a) and of the statement under s 112 of the CPC, which he had taken from defendant 1(a). In the s 112 statement the first defendant 1(a) had admitted that she had not purchased the two units or paid for the purchase price but that she had acted as the second defendant's nominee. The two first defendants objected to the admissibility of the s 112 statement for the purpose of a civil trial. They also claimed that the plaintiff had not proved her claim against them. However, the two first defendants chose not to give any evidence but instead made a submission of no case to answer.

Held, allowing the plaintiff's claim with costs of RM40,000 to the plaintiff and RM20,000 to the intervener bank:

(1) In a civil trial the test of admissibility of a statement under s 112 of the CPC was one of relevancy to subject matter of present case. The s 112 statement in the present case, which was taken following a police report lodged by the plaintiff and which report had been admitted as evidence in this civil trial, would be relevant in showing the frame of mind of the first defendant 1(a), particularly since the first defendant was obliged to tell the truth when making such a statement. In any case, the first defendant 1(a) would not be prejudiced by the admission of this statement, as she

had every opportunity of challenging or clarifying its contents by going into the witness box. As such, the s 112 statement ought to be admitted in evidence (see paras 28–29). A

(2) Based on the plaintiff's evidence and the corroborative evidence of the Honorary Advisor to the Penang State Government's Tourism Action Council and the IO the plaintiff had proved beyond a reasonable doubt fraud on the part of the second defendant, who had since absconded (see para 33). B

(3) The two first defendants' refusal to take the stand coupled with the absence of evidence from first defendant 1(a) that she had paid for the two units herself, led to an adverse inference being drawn against her. It is settled law that when a person had advanced the purchase price of a property and that property was not registered in that person's name that there was a presumption that the person registered as the buyer was holding it in trust for the person who paid the full purchase price of the property. In the circumstances this was a fit case for the application of the doctrine of constructive trustee where the purchase price for the two units was not paid by the first defendant 1(a) but had been shown from uncontradicted evidence as coming from the plaintiff to the second defendant with the knowledge of the first defendant 1(a). Further, the two first defendants could not rely on their pleadings in their defence to refute the plaintiff's case as the pleadings were not a substitute for adducing evidence. In the absence of evidence from the second defendant refuting the plaintiff's evidence that the full purchase price had come from her, the plaintiff had proved her claim against the second defendant and consequently the two first defendants where a breach of a constructive trust was concerned (see paras 35 & 47). C D E F

(4) There was no evidence that the bank knew about the fraud or was a party to the conspiracy to defraud the plaintiff. That being the case, the bank as a chargee or a bona fide purchase for valuable consideration was entitled to the protection afforded it under s 340 of the NLC. Whilst the continuing refusal of the first defendants to transfer the apartments back to the plaintiff was fraudulent and the transfer of the apartment to them from the vendor ought to be set aside in favour of the plaintiff, yet the bank's title was indefeasible. However, although the interest of the bank was indefeasible, it had only acquired an interest over the apartment and not the title to it (see paras 52 & 54). G H

(5) In the circumstances, a declaration was passed that the plaintiff was the owner of the two units with the first defendants to execute the valid transfer forms transferring the two units to the plaintiff. The plaintiff was also awarded damages of RM5,000 in respect of the unit that was charged to the bank and RM60,000 for the other unit that the first defendants had rented for a profit. The first defendants were also ordered to pay to I

the bank the redemption sum in respect of the charged unit for the unit to be so discharged. Alternatively the plaintiff was at liberty to pay the redemption sum to get a full discharge of the charge with such sum paid to be deemed as judgment entered and enforceable against the first defendants. Damages for fraudulent breach of trust were to be assessed by the SAR (see paras 72–75 & 77).

[Bahasa Malaysia summary

Semasa bercuti di Cameron Highlands, Malaysia, plaintiff, seorang wanita Jepun yang telah bersara, telah berasa tertarik untuk tinggal di kawasan itu di bawah Program Malaysia Rumah Kedua Ku ('MM2H'). Dia dengan itu telah membuat rancangan persaraan untuk membeli dua apartmen: satu untuk didiami dan satu lagi untuk disewa dan menerima pendapatan sewa. Plaintif telah berkawan dengan defendan kedua, yang juga datang daripada negara Jepun, dan dia memperkenalkannya kepada dua apartmen baru untuk dijual dalam hotel di mana dia tinggal. Defendan kedua memberitahu plaintif bahawa tanpa visa di bawah MM2H dia tidak boleh membeli apartmen-apartmen tersebut. Dia kemudian memperkenalkan plaintif kepada Annie Lor Lee Fong, defendan 1(a). Plaintif mendakwa bahawa urusan-urusan kemudian telah dibuat untuk defendan 1(a) dan anak lelakinya, defendan 1(b), untuk membeli dua unit di Apartmen Greenhill Resort ('pusat peranginan tersebut'), atas nama mereka untuk faedah plaintif. Harga belian dua unit tersebut masing-masing adalah RM205,000 dan RM228,100. Pada masa sama defendan kedua juga telah meyakinkan plaintif untuk membeli unit ketiga dalam pusat peranginan tersebut. Plaintif mendakwa bahawa dia telah membayar defendan kedua jumlah keseluruhan RM611,800 untuk membeli tiga unit apartmen di pusat peranginan tersebut. Berikutan itu, plaintif mendapati daripada Penasihat Kehormat kepada Majlis Tindakan Pelancongan Kerajaan Negeri Pulau Pinang bahawa tiada larangan terhadapnya membeli apartmen-apartmen tersebut atas namanya jika belian tidak melebihi RM150,000. Plaintif kemudian meminta hak milik strata dua unit tersebut, yang mana adalah atas nama defendan pertama, untuk dipindahkan atas namanya tetapi dua daripada defendan-defendan pertama telah enggan berbuat demikian. Berhubung unit ketiga itu, jualan tersebut tidak dilaksanakan langsung dan defendan kedua yang tidak boleh dihubungi kemungkinan besar telah menghilangkan diri. Plaintif telah memasukkan kaveat ke atas dua unit tersebut dan memulakan guaman ini di mana dia memohon, antara lain, satu deklarasi bahawa dia adalah pemilik sah dua unit tersebut, ganti rugi untuk fraud terhadap defendan-defendan dan ganti rugi kerana pelanggaran amanah sebagai pemegang amanah konstruktif terhadap dua daripada defendan-defendan pertama. Oleh kerana salah satu daripada dua unit tersebut telah digadaikan kepada Public Bank Bhd untuk pinjaman bagi modal kerja, bank tersebut telah mohon untuk campur tangan. Semasa perbicaraan plaintif telah mengemukakan keterangan dokumentar resit-resit atau keterangan pemindahan daripada akaun banknya kepada defendan

kedua. Plaintif juga telah memberi keterangan bahawa defendan 1(a) telah memecah masuk ke dalam dua unit tersebut dan mula menyewakannya kepada pelancong. Plaintif juga mendakwa bahawa dia telah membuat empat laporan polis berhubung bagaimana dia telah ditipu oleh defendan-defendan pertama. Pegawai penyiasat ('PP') telah memberi keterangan berhubung temubualnya dengan defendan 1(a) dan kenyataan di bawah s 112 Kanun Tatacara Jenayah (KTJ), yang mana dia telah ambil daripada defendan 1(a). Dalam kenyataan s 112 defendan pertama 1(a) telah mengaku bahawa dia tidak membeli dua unit tersebut atau membayar untuk harga belian tetapi bahawa dia telah bertindak sebagai penama defendan kedua. Dua daripada defendan-defendan pertama telah membantah terhadap kebolehterimaan kenyataan s 112 bagi tujuan perbicaraan sivil. Mereka juga mendakwa bahawa plaintif tidak membuktikan tuntutannya terhadap mereka. Walau bagaimanapun, dua daripada defendan-defendan pertama telah memilih untuk tidak memberi apa-apa keterangan tetapi sebaliknya membuat hujah tiada kes untuk dijawab.

Diputuskan, membenarkan tuntutan plaintif dengan kos RM40,000 kepada plaintif dan RM20,000 kepada bank pencelah:

(1) Dalam perbicaraan sivil ujian kebolehterimaan kenyataan s 112 KTJ merupakan suatu perkaitan berhubung hal perkara kes ini. Kenyataan s 112 dalam kes ini, yang telah diambil berikutan laporan polis yang dibuat oleh plaintif dan yang mana laporan itu telah diterima sebagai keterangan dalam perbicaraan sivil ini, adalah relevan dalam menunjukkan pemikiran defendan pertama 1(a), khususnya oleh kerana defendan pertama diwajibkan untuk bercakap benar semasa membuat kenyataan sedemikian. Dalam mana-mana kes, defendan pertama 1(a) tidak diprejudis oleh penerimaan kenyataan ini, kerana dia mempunyai peluang untuk mencabar atau menjelaskan kandungannya dengan memasuki kandang saksi. Oleh itu, kenyataan s 112 patut diterima sebagai keterangan (lihat perenggan 28–29).

(2) Berdasarkan keterangan plaintif dan keterangan sokongan Penasihat Kehormat kepada Majlis Tindakan Pelancongan Kerajaan Negeri Pulau Pinang dan PP plaintif telah membuktikan melampaui keraguan munasabah fraud di pihak defendan kedua, yang telah menghilangkan diri (lihat perenggan 33).

(3) Keengganan dua daripada defendan-defendan pertama untuk membuat pendirian bersama ketiadaan keterangan daripada defendan pertama 1(a) bahawa dia telah membayar untuk dua unit itu sendiri, membawa kepada inferens bertentangan dibuat terhadapnya. Adalah undang-undang tetap bahawa apabila seseorang mendahulukan harga belian hartanah dan bahawa hartanah itu tidak didaftarkan atas nama orang itu di mana terdapat andaian orang yang didaftarkan sebagai pembeli itu memegangnya atas amanah untuk orang yang telah

membayar harga penuh belian hartanah itu. Dalam keadaan tersebut ini adalah kes sesuai untuk permohonan doktrin pemegang amanah konstruktif di mana harga belian untuk dua unit itu tidak dibayar oleh defendan pertama 1(a) tetapi telah ditunjukkan daripada keterangan tidak bertentangan yang datang daripada plaintif kepada defendan kedua dengan pengetahuan defendan pertama 1(a). Selanjutnya, dua daripada defendan-defendan pertama tidak boleh bergantung kepada pliding mereka dalam pembelaan mereka untuk menyangkal kes plaintif kerana pliding itu bukan untuk pengganti untuk mengemukakan keterangan. Ketiadaan keterangan daripada defendan kedua menyangkal keterangan plaintif bahawa harga belian penuh telah datang daripadanya, plaintif telah membuktikan tuntutannya terhadap defendan kedua dan seterusnya dua daripada defendan-defendan pertama di mana pelanggaran amanah konstruktif adalah berkaitan (lihat perenggan 35 & 47).

(4) Tiada keterangan bahawa bank mengetahui tentang fraud itu atau merupakan pihak kepada konspirasi untuk menipu plaintif. Jika begitu, bank itu sebagai pemegang gadaian atau pembeli berniat baik untuk balasan bernilai berhak mendapat perlindungan yang diperuntukkan di bawah s 340 Kanun Tanah Negara ('KTN'). Manakala keengganan berterusan defendan pertama untuk memindahkan apartmen-apartmen itu balik kepada plaintif adalah suatu penipuan dan pemindahan apartmen kepada mereka daripada penjual patut diketepikan memihak kepada plaintif, malah hak milik bank adalah tidak boleh disangkal. Walau bagaimanapun, meskipun kepentingan bank tidak boleh disangkal, ia hanya mempunyai kepentingan ke atas apartmen itu dan bukan hak milik ke atasnya (lihat perenggan 52 & 57).

(5) Dalam keadaan ini, satu deklarasi telah diluluskan bahawa plaintif adalah pemilik dua unit tersebut yang mana defendan-defendan pertama perlu menyempurnakan borang-borang pemindahan sah untuk dua unit tetrsebut kepada plaintif. Plaintif juga diawardkan ganti rugi RM5,000 berkaitan unit yang dicagar ke bank dan RM60,000 untuk unit lain yang telah disewakan oleh defendan-defendan pertama dengan keuntungan. Defendan-defendan pertama juga diperintahkan untuk membayar bank jumlah penebusan berkaitan unit yang dicagarkan agar unit itu dilepaskan. Secara alternatif plaintif bebas untuk membayar jumlah penebusan untuk mendapat pelepasan penuh yang mana jumlah yang telah dibayar itu dianggap sebagai penghakiman yang dimasuki dan berkuat kuasa terhadap defendan-defendan pertama. Ganti rugi untuk pelanggaran penipuan amanah adalah ditaksirkan oleh penolong pendaftar kanan (lihat perenggan 72–75 & 77).]

Notes

For a case on statement under s 112 of the Criminal Procedure Code, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2985.

For cases on fraud, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3485–3532.

Cases referred to

Choong Kwee Sang v Choong Kwee Keong (as the executor of the estate of Chan Fook Lin, deceased) [2009] 1 MLJ 186; [2008] 5 AMR 394, CA (refd)
Govindasamy s/o Muthulingam v Ooi Kee Chye & Anor [2012] 7 MLJ 254, HC (refd)
Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81, CA (refd)
Ng Ben Thong & Ors v Krishnan a/l Arumugam [1998] 5 MLJ 579, HC (refd)
OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim [1999] 2 MLJ 511, CA (consd)
Ooi Choon Lye v Lim Boon Kheng & Ors [1972] 1 MLJ 153, FC (refd)
Owe Then Kooi v Au Thiam Seng & Anor Development & Commercial Bank Bhd v Au Thin Chai & Ors (Owe Then Kooi, intervener) [1990] 1 MLJ 234, HC (refd)
Puspavathy a/p Thaveethu v Majlis Perbandaran Klang & Ors and other appeals [2008] 6 MLJ 672, CA (refd)
Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip [1995] 3 MLJ 74, PC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (consd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)
Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289; [2009] 2 CLJ 363, CA (refd)
Teh Cheng Choo v Malayan Banking Berhad [2009] 5 CLJ 463, CA (refd)

Legislation referred to

Criminal Procedure Code s 112
Evidence Act 1950 s 5
National Land Code ss 5, 340, 340(1), (2), (2)(a), (b), (3)

Lucia Menta (Darshan Singh & Co) for the plaintiff.
Chan Ho Chin (LW Ong & Chan) for the fisrst defendant (a).
Cheah SV (KH Wong, Chin & Cheah) for the fisrst defendant (b).
Poh Choo Hoe (Violet Liang with him) (Shook Lin & Bok) for the intervener.

Lee Swee Seng JC:

[1] The plaintiff is a Japanese. She is now 79 years old. She retired some 24 years ago when she reached 55. She was working as an office clerk in a planning

company. She speaks no English and only Japanese. She came to Malaysia as a tourist in 2004 with a friend Mrs Michiko Masaki. She visited Cameron Highlands and fell in love with the place. They stayed two nights at the Heritage Hotel in Tanah Rata, Cameron Highlands.

[2] She thought of her retirement plans. She had the idea of buying an apartment in Cameron Highlands to stay under the Malaysia My Second Home Programme ('MM2H'). Looking at her savings and the price of the apartments there, she calculated that she could afford to buy two units: one to stay and one to let out and receive a constant stream of income.

[3] She met a fellow countryman called Ikeda Masami, the second defendant ('D2') on 8 December 2004. He was especially kind to her and having known of her intentions, he introduced her to two apartments for sale in Heritage Hotel itself. He told her that without a visa under the MM2H she cannot purchase the apartments and so the purchase has to be registered under a local Malaysian name. He introduced her to his local friend Annie Lor, who is defendant 1(a). The plaintiff met up with the second defendant ('D2') and defendant 1(a) ('D1a') for about seven to eight times. The representation given by D1a to the plaintiff was that the two apartments would be registered in the name of D1a.

PROBLEM

[4] The two units were identified as G15 and G16, Greenhill Resort Apartment, Heritage Hotel, Tanah Rata, Cameron Highlands, Pahang Darul Makmur. She was shown the two apartments by one Mrs Tan, a representative and wife of a Director of Tan Say Theam & Sons Sdn Bhd, the owner and intended seller of the apartments. Together with her were her friend Michiko, Annie Lor ('D1a') and Ikeda Masami ('D2').

[5] On the same day 17 December 2004, she paid the deposit of ¥150,000 (about RM4,500) and USD 250 to D2 and D2 gave her a receipt. There was a celebration at a restaurant called the Hong Kong Restaurant operated by D1a and two photographs were taken and exhibited in court, one showing D1a, D2 and the plaintiff at the restaurant and another showing D2, Michiko and the plaintiff shaking hands and happy that the plaintiff had purchased the two apartments. Little did she realise at that time that her happiness would soon turn into a most harrowing experience for her.

[6] When she went back to Japan, at the request of D2, she paid further sums of money to D2 in cash. The sum was ¥ 12,360,000 (about RM374,600) for the two apartments for which D2 gave a handwritten receipt in Japanese. (Exhibit P4 and the translation exh P4T). Charm and charisma must have

characterised his life for when D2 proposed a further purchase of another unit of apartment H-22, the plaintiff agreed and paid him in cash when he came to Japan on 14 June 2005. The sum was for ¥ 4,580,000 (about RM138,800) for which he gave a receipt in Japanese.

[7] Believing D2's representation that the price for the unit had gone up, the plaintiff transmitted further sums of money in D2's account; on 2 September 2005 the sum of ¥ 3,000,000 (about RM90,900) to D2's account in No 1030208 with Mitsui-Sumitomo Bank in Ooita Branch following his request. Again on 4 November 2005, she transmitted ¥100,000 (about RM3,000) to him in the same account.

[8] All in she had transferred the sum of ¥20,190,000 which is equivalent to RM611,800 to D2.

[9] The purchase price for apartment G15 was RM205,000 and that for apartment G16 was RM228,100.

[10] She was later to discover that there was no prohibition against her purchasing the apartments in her name so long as the purchase price was more than RM150,000. She asked for the two apartments G15 and G16 to be transferred back to her name. According to her D2 said he would ask D1a to do that but to no avail. She discovered that the two units have now been registered in the names of D1a and D1b, one Valen Ng Wai Loon who is the son of D1a. D1a and D1b shall be collectively referred to as the first defendants.

[11] The plaintiff subsequently lodged a caveat over the two apartments. As for the unit H-22, the sale was not effected at all. D2 could not be contacted at all and for all intents and purposes has absconded.

THE PRAYER

[12] She sued to get back her two units and for damages for fraud against the defendants and for damages for breach of trust as constructive trustees against D1a and D1b. She prayed for a declaration that she is the rightful owner of the two units and that the defendants be restrained from dealing with the said units. The unit G-15 has been charged to Public Bank Bhd for a loan for working capital and so the bank applied to intervene.

[13] There was no counterclaim by the defendants. D1a and D1b have also not counterclaimed for rental for the occupation by the plaintiff of unit G15 or for vacant possession of the said unit.

[14] D2 though duly served with the writ and statement of claim, did not enter appearance. Neither was he called as a witness by D1a.

THE PAROL AND PAPER EVIDENCE

[15] The plaintiff gave evidence as to what happened from the time she first visited Cameron Highlands and her decision to buy two units of apartments there to how she met D1a and D2. She gave evidence of the details of payments supported by documentary evidence of receipts or evidence of transfer from her bank account to D2. A summary of the various payments received by D2 is reproduced below:

No.	Date	Particulars	Amount (¥)	Amount (RM)	Exhibit
(i)	17-12-2004	Cash	¥ 150,000.00	RM 4,500.00	P1
(ii)	19-01-2005	To buy G-15 &	¥ 12,000,000.00	RM363,700.00	P4
		G-16	¥ 360,000.00	RM 10,900.00	P4
(iii)	14-06-2005	To buy H-22	¥ 4,580,000.00	RM138,800.00	P1
(iv)	02-09-2005	Through JA Bank to Mitsuo Sumitomo	¥ 3,000,000.00	RM 90,900.00	P6
(v)	04-11-2005	Through JA Bank to Account No. 1030208 of the 2nd Defendant	¥ 100,000.00	RM 3,000.00	P6
			¥ 20,190,000.00	RM611,800.00	

[16] There can be no dispute that the strata titles to the two units in G15 and G16 are in the name of D1a and her son D1b.

[17] The plaintiff also gave evidence that after the purchase of the two apartments, she stayed at Unit G15 and Unit G16 was empty. She has the keys to both the units. However on 3 October 2008 D1a broke the lock to unit G16 and changed the keys to the said unit and starting letting out the said unit G16 to tourists. According to her D1a let out the apartment daily at RM300 per day on weekday and RM450 for the three-room apartment per day on holidays.

[18] PW2 Kyo Hoshino, a fellow Japanese who alerted her to the fact that she has been cheated, gave evidence of the various meetings he had with the plaintiff and D1a, D1a's mother Mdm Chan and also PW3 one Laura Lau Siew Cheng. PW2 acted as an interpreter for the Plaintiff in all these meetings. He is also a retiree who is here under MM2H visa. He was also the Honorary Advisor to the Penang State Government's Tourism Action Council to promote

MM2H in Japan. The plaintiff had sought his help with respect to her application for her visa under MM2H. According to her D2 had told her that the two apartments could not be registered in her name until her visa under MM2H had been obtained. She understood the visa under MM2H to be for ten years in two stages of five years. It was PW2 that told her that there was no such necessity and that she had been cheated! She confronted D2 with some Japanese friends on 14 March 2006 to request D2 to transfer the two units back to her. D2 told her that he would ask D1a to do so. After that D2 left for Thailand and he came back a week later on 21 March 2006 and gave her a handwritten note in Japanese dated 23 March 2006 saying that he had told D1a and she had agreed to transfer the two apartments back to her. After that she could not contact him anymore and he would appear to have absconded.

[19] PW 3 Laura Lau, is the General Manager of Heritage Hotel where the two apartments are at. As she knows D1a, PW2 had asked for her help to resolve the problem that had arisen. As D1a does not speak English well, PW3 had also acted as her interpreter in the meetings that involved the plaintiff, PW2, D1a and D1a's mother to resolve the matter. She kept minutes of the meetings as well which minutes were produced as exhibits in court. At one of the meetings, D1a told the plaintiff, PW2 and PW3 that D2 had paid RM400,000 into her account for her to purchase the two apartments.

[20] At one time there was even the suggestion that the two units be transferred back to the plaintiff but that as the plaintiff has been staying in unit G15, she should be allowed to stay there until she leaves for Japan for good and at that time the unit be transferred to D1a. That was out of sympathy on the plaintiff's part as D1a said during the meetings that D2 owed her RM170,000. However, even then D2 did not agree to settle the matter.

[21] The plaintiff had no alternative but to file her claim in court. She lodged no less than four police reports and the Investigating Officer ASP Rahmat bin Zakaria gave evidence of the interview he had with D1a and the s 112 statement of the Criminal Procedure Code ('CPC') that he had taken from D1a on 11 May 2006.

[22] The ASP said that the police reports lodged by the plaintiff were with respect to how she had been cheated by D2 and D1a. The ASP confirmed that D1a did not make any police report concerning the case. One would have expected that if she had been cheated too by D2 she would have made her police report.

[23] There were some objections by learned counsel for D1a and D1b to the admissibility of a s 112 statement for the purpose of a civil trial. Parties agreed that I should hear submissions before ruling on its admissibility. After hearing

submissions and after ruling that the statement was admissible, PW4 the ASP was recalled to tender the statement as exh PSP4.

[24] The evidence of ASP Rahmat and as evidenced from her s 112 statement was D1a admitted she did not purchase the two units of apartment in G15 and G16 or paid for the purchase price. She said the purchase price was paid by D2 and that she had allowed her name to be used as his nominee. She also admitted that she does not own the two apartments. From his investigation he was satisfied that the plaintiff had paid the purchase price to D2 for the purchase of the two units of apartments and that D2 had informed the plaintiff that the apartments could not be registered in her name as she did not have a MM2H visa and that the apartments will be registered in the name of his friend D1a whom the plaintiff had met a few times after the plaintiff was introduced to D1a by D2. The parties have met a few times at D1a's Hong Kong Restaurant and the plaintiff is certainly not unknown to D1a. He explained the meaning of a s 112 statement to D1a in Bahasa Malaysia and she understood him and further that she was obliged to tell the truth in the statement.

[25] From PW 4's investigation, D2 could not be located and is believed to have left for Thailand.

[26] After the plaintiff had called four witnesses including herself, the plaintiff through her counsel, Miss Lucia Minta, closed her case. Surprisingly the counsel for D1a and D1b, Mr Chan Ho Chin and Mr S V Cheah respectively, submitted no case to answer. The usual caution was highlighted to them that by so doing they would have elected not to call any witnesses even if the court were to find in favour of the plaintiff to which both counsel admitted so and understood their election not to call any witnesses. I said 'surprisingly' because both D1a and her mother were in court for most of the proceedings and also when the plaintiff closed her case.

[27] It would be opportune for me to state at this juncture that the bulk of the evidence of PW1 the plaintiff and PW4, the whole of the evidence of PW2 and PW3, were heard by a previous judicial commissioner who at the time of continued hearing, had gone on transfer. The Honourable Chief Judge of Malaya had directed me to hear the case. Learned counsel for D1a and D1b had objected to me hearing the case on ground that I had not had the benefit of observing the demeanour of the witnesses. Their further written request to the Honourable Chief Judge of Malaya to have the case heard before the previous judicial commissioner had been rejected. Before me PW1 was recalled to tender one police report and PW4 recalled to tender the s 112 statement of D1a. As it turned out since D1a and D1b had decided to submit a no case to

answer, the evidence as summarised above, remained uncontradicted.

THE PRELIMINARY POINT

[28] There was objection taken to the admissibility of a s 112 of the CPC statement given by D1a to ASP Rahmat PW4. In a civil trial the test of admissibility is relevancy. I have no reason to doubt the evidence of ASP Rahmat that D1a did give a statement under s 112 of the CPC to him and that she did sign the document. Section 5 of the Evidence Act 1950 reads:

> Section 5 Evidence may be given of facts in issue and relevant facts.
>
> Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

[29] As the statement was taken following a police report lodged by the plaintiff which report have been admitted as evidence in this civil trial, the statement would be relevant in showing the frame of mind of D1a and more so when under a s 112 statement she is obliged to tell the truth.

[30] In *Ooi Choon Lye v Lim Boon Kheng & Ors* [1972] 1 MLJ 153 the Federal Court speaking through Gill FJ said:

> I do not think there is any prohibition against its (a statement taken by the police in the course of his investigation) use in a civil case, so long as it is relevant to the subject matter of the case. The police may refuse to furnish a party to a civil action with a copy of such a statement, which I think they are entitled to do, but that is no reason why, if the deputy public prosecutor chooses to supply it, as he did in this case, it cannot be used for the purpose of cross-examination.

[31] The ASP was cross-examined by the first defendants' counsel and D1a could always go into the witness box later to explain the answers given to questions posed by the ASP. Here as stated they chose not to give any evidence. As far as weight is concerned, this would depend on the testimony of ASP Rahmat himself and how he would fare under cross-examination and also the evidence of D1a who gave the statement when she would later give her evidence and how she would fare under cross-examination.

[32] I do not see how she can be prejudiced by the admission of the statement as she has every opportunity of challenging or clarifying its contents by going into the witness box. After hearing submissions and for the reasons given above, I had allowed the statement to be admitted and to be marked as exh P30.

A

THE PRINCIPLES

Whether the first defendants are liable as constructive trustees and for breach of trust towards the plaintiff

B

[33] Based on the evidence of the plaintiff and the corroborative evidence of PW2, PW3 and PW4, I am more than satisfied that the plaintiff has proved beyond a reasonable doubt fraud on the part of D2. He did not enter appearance and as I said before, it looks like he has absconded.

C

[34] As for D1a, she has not called D2 to give evidence in her favour and she has also not put in a claim against D2 if indeed she was an innocent victim. In fact the evidence against her which she has not denied was that she did not pay for the two apartments and that D2 had transferred RM400,000 into her account for her to purchase the two apartments. The uncontradicted evidence of the plaintiff is that D1a knew that the monies had come from the plaintiff for the purchase of the two apartments and that they were to be registered in her name on trust until the plaintiff obtained her visa under MM2H Programme. She had taken liberty to register the apartments in her name and her son's name as D1b. More than that she has subsequently charged the unit G15 to the Bank for a loan for working capital.

D

E

[35] All these evidence was not rebutted by D1a and D1b. All she needed was to go into the witness box, take the oath to tell the truth and tell the court her version as to what happened. There is something to be said about a defendant being present in court with her witnesses but refusing to go into the witness box or take the stand. Indeed case law tells us that an adverse inference ought to be drawn against her and more so when there is no evidence from her that she had paid for the two apartments herself. There is something liberating and even life-saving in telling the truth and when a defendant refuses to take the stand in the light of the damning evidence against her as in this case, it can only mean that either she is afraid to confront the truth or that she really has nothing to rebut the plaintiffs case. Fearlessness is the result of being in the side of truth and fear is because of falsehood. There is no fear if one is in the same side as truth and more so when one is defending one's property in the two apartments.

F

G

H

[36] Her defence was, inter alia, that she had taken a loan to purchase the unit G15 but the evidence adduced by the bank was that the loan of RM184,000 was released to her and not to the vendor of the property. It was a loan taken as a working capital for her business. She denied that she and her son held the two apartments in trust for the plaintiff. She even alleged that the unit G15 was being let out at RM300 per day to the plaintiff but then the plaintiff

I

had not been paying any rental to D1a and D1a has not made any claim for rental. She also denied that she had broken the lock to unit G16 and that the keys actually have been given to her by the vendor. Other than that the rest of her defence was a bare denial including the allegation that the monies transmitted to D2 by the plaintiff was meant for the purchase of another unit H 22. The defence of her son in D1b followed her similar stand.

[37] If her stand is that she is holding the two apartments in trust for D2, then she has not pleaded that nor given evidence on that. If her stand is that the two apartments are a gift to her from D2, again she has not pleaded that nor given evidence on that. If her stand is that she had paid for the two apartments, then she has not given any evidence on that. In fact she is completely silent about the unit G16 which she has not explained how she landed up being registered owner.

[38] What was observed in *Choong Kwee Sang v Choong Kwee Keong (as the executor of the estate of Chan Fook Lin, deceased)* [2009] 1 MLJ 186 at p 203; [2008] 5 AMR 394 p 407 is of relevance here:

> (a) *Where A makes a voluntary payment to B or pays wholly or in part for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions*. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter presumption of advancement or by direct evidence of A's intention to make an outright transfer.
>
> [76] Though the appellant relied on the authority of *Loo Hon Kong v Loo Kim Lin* [2004] 4 AMR 591 at pp 597–598; [2004] 4 CLJ 1 at pp 9–10 to support his claim, the above authority is of little help to him. This is simply because in the above case, the fact that the plaintiff paid for the entire purchase price for the land was undisputed and clearly established. The issue in that case, was that, since the land was registered in the defendant's name thus vesting legal ownership in the defendant, and because the relationship between the plaintiff and defendant did not come within one of the categories recognised by equity as creating a presumption of advancement in favour of the defendant (as holder of the legal title), the beneficial ownership results to the plaintiff. However, in the instant appeal, the appellant cannot have recourse to the above authority to support him because the fundamental issue of whether the appellant paid for the subject properties had not even been established by him. (Emphasis added.)

[39] This is a fit case for the application of the doctrine of constructive trust where the purchase price to the two apartments were not paid by D1a and in fact, it has been shown from uncontradicted evidence that it had come from the plaintiff to D2 with the knowledge of D1a. In *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as*

administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289; [2009] 2 CLJ 363, it was observed as follows in the headnotes:

> At all material times the deceased and the first defendant were friends and had some business dealings from time to time. The plaintiffs claimed that the first defendant had not paid the purchase price to the deceased for the said shares. Alternatively, the plaintiffs averred that the transfer of the said shares to the first defendant was made without any consideration at all and it was unlawful and unconscionable for the first defendant to retain ownership of the said shares. The first defendant contended that it was agreed between the deceased and him that pursuant to the management buy-out of certain companies, the said shares be given to the first defendant. The learned judge of the High Court allowed the plaintiffs' claim and ordered that all the shares together with all dividends arising therefrom to be returned by the defendants to the plaintiffs. The learned judge also held that the first defendant held the said shares on trust for the deceased and that the third, fourth and fifth defendants were constructive trustees of the said 4 million shares held in their respective names for the deceased's estate. Hence, this appeal.
>
> (2) There will be unjust enrichment if the defendants were allowed to keep the said shares. The learned judge was right in imputing or imposing a constructive trust whereby the first defendant held the said shares on trust for the deceased's estate, (para 95)
>
> This trust does not need to be in writing. The law will impute or impose a constructive trust by which he held the said shares and also the bonus issue and any other accretions relating to the said shares on trust for the deceased's estate, (paras 96 & 97)
>
> (4) The transfer of the said shares was not intended to operate as a gift. There was clearly no intention of a gift. The beneficial interest never left the deceased with the result that there was no disposition of that interest in the said shares. Absence of writing does not preclude the deceased as transferor from asserting his entitlement in equity. It is unconscionable after the failure to make payment for the said shares for the first defendant to assert his rights as registered owner of the said shares. He failed to fulfill that condition. A failure of consideration occurred as there had been a failure of performance by the first defendant of his obligation under an arrangement which was initially binding. Under the circumstances the learned judge was correct by way of remedy to impose a constructive trust on the first defendant who knowingly retained property of which the deceased has been unjustly deprived of. (para 99)

[40] Her counsel would have instructed her that her pleadings in her defence and that of her son D1 b are not evidence and that no matter how credible it may appear, she and her son must still give evidence on oath and be subject to the crucible of cross-examination. The first defendants cannot rely on their pleadings in their defence to refute the plaintiff's claim. Pleadings are not a substitute for adducing evidence as highlighted in *Ng Ben Thong & Ors v Krishnan a/l Arumugam* [1998] 5 MLJ 579 at p 583 where it was held that:

I am asked by the defence to rely on its pleadings and to dismiss this case. *The defendant must realize that pleadings is not evidence. It is a bare averment of a party's case. The party has to adduce evidence to substantiate its pleadings. Whilst pleadings cannot become evidence in the absence of evidence being led in court, similarly evidence cannot be led outside the pleadings*. Pleadings and evidence become the heart and soul of a case. They complement each other.

In the case before me for reasons best known to himself, the defendant did not turn up in court. An opportunity was given when the case was adjourned, before his counsel commenced cross examination. Both counsels went to the locus in quo. Surely if the defendant was interested in defending this case, he would have at least seen his counsel and recognized him and could have attended court the next day. *In the circumstances, the defendant's pleadings, namely his defence, remains as bare allegations, unsubstantiated by the live-giving evidence that must of necessity course through the veins of his case to sustain in. Bereft of any evidence, the defendants case was a non-starter*. On the other hand, the case for the plaintiffs was fully substantiated by the evidence of both PW1 and PW2. Each of them gave their evidence very candidly and denied the averments of the defence. I have no reasons to doubt their evidence. (Emphasis added.)

[41] Some things loom large in the overall scheme of sieving through the evidence adduced by the plaintiff and satisfying oneself of the plaintiff's claim in the absence of any evidence from the defendants. First the evidence of the plaintiff is presumed to be true unless it is inherently incredible and second an adverse inference ought to be drawn against the silent defendant who has studiously taken the stand not to give evidence by submitting no case to answer. The Federal Court speaking through His Lordship Gopal Sri Ram FCJ in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 at p 759 has given us a useful guide to follow when there is no evidence forthcoming from a defendant:

In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. *In the first place, the evidence given by the appellant ought to have been presumed to be true*. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* (1931) 1 MC 125 at p 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. *At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true*.

Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial

judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. *In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way*. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 where Peh Swee Chin FCJ said: The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it. (Emphasis added.)

[42] As was succinctly stated by His Lordship Suriyadi JCA in *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81:

[32] It must be understood that once a defendant elects not to call for evidence, apart from him being bound by that election, *the effect is also that all the evidence led by the plaintiff must be assumed to be true*. This proposition of law was succinctly said in *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 at p 712:

> For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true. (Emphasis added.)

[43] It was observed too that plaintiff has stated that D1a is D2's mistress to which D1a has denied in her defence and in answer thereto she had stated that she was just a special friend. Whatever it is D2 must have trusted D1a enough to allow D1a to be the registered owner of the two apartments. If indeed D1a also could not contact D2, then she needs to come and give evidence to that effect. So too her allegation that D2 owes her RM 170,000 and her fear that one day D2 might come back and claim the two apartments from her. However she cannot vacillate between whether she is holding the apartments in trust for the plaintiff, or that she is holding the apartments in trust for D2 or that the apartments are a gift from D2 to her.

[44] At any rate D2 had not entered appearance at all. It is not for D1a to say

that the writ and statement of claim had not been served on D1 at his address used for correspondence which is the address of Hong Kong Restaurant which AR card was returned duly acknowledged. The only one who has locus to challenge the validity of service would be D2 himself. Perhaps D1a can inform D2 about it for she knows him as a special friend. One would suppose that she would stay in constant touch with him to nurture that special element in their friendship.

[45] We are aware that when a person has advanced the purchase price of a property and that property is not registered in that person's name there is a presumption that the person registered as the buyer and new owner is holding it in trust for the one who has come out with the full purchase price of the property.

[46] The stand taken by learned counsel for D1a and D1b is that the plaintiff's evidence is so unsatisfactory that she has not proved her claim against their clients. Both learned counsel for D1a and D1b, Mr H C Chan and Mr S V Cheah respectively, drew support from the case of *Govindasamy s/o Muthulingam v Ooi Kee Chye & Anor* [2012] 7 MLJ 254 p 270 where His Lordship Chew Soo Hoo JC, inter alia, held that:

> However, *the fact that a defendant elects not to testify, does not relieve the plaintiff from his burden of having to prove his case in accordance with the standard of proof required by the law and in line with his pleaded case*. Since the plaintiff herein had given evidence of an entirely different version of his alleged acquisition of the said land from his pleaded case for which this court must necessarily reject, the plaintiff had deprived this court of its duty to presume his evidence to be true and to accept his evidence as true. *By failing to prove his own pleaded case, the plaintiff had given up his right for his evidence to be presumed to be true and to be accepted as true as against a non-testifying second defendant*. Similarly, an adverse inference drawn against the second defendant would have no effect in the circumstances. Therefore, when the plaintiff had failed to prove his case, the second defendant was entitled to refrain from leading evidence but to submit of a no case to answer. When the plaintiff had failed in his burden of proof, I am of the view that there is no onus for the second defendant to rebut. (Emphasis added.)

[47] With respect I do not agree that the evidence adduced by the plaintiff and her witnesses have been so unsatisfactory that the plaintiff has failed to discharge the standard and burden of proof that reposed with her. The evidence that she gave has a ring of truth and when one looks at what is at stake ie the ownership of the two apartments and the allegation of a breach of trust against D1a and D1b, it behoves them to go into the witness box and take the stand that they are totally unaware of the plaintiff's interest and that they were holding the apartments in trust for D2. Even assuming that they had done that, in the absence of evidence from D2 refuting the plaintiff's evidence that the full

purchase price had come from the plaintiff under the circumstance where D2 had told her that she could not be the registered owner until she has obtained her visa under MM2H Programme, this court would be inclined to conclude that the plaintiff has proved her claim against D2 and consequently against D1a and D1b where breach of a constructive trust is concerned. As was held in *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip* [1995] 3 MLJ 74 at pp 74–75 and as summarised in the headnotes:

> (1) A person who dishonestly procures or assists in a breach of trust or fiduciary obligation is liable in equity to make good any resulting loss. Although dishonesty is a necessary and sufficient ingredient of accessory liability, the breach of trust itself need not be a dishonest and fraudulent breach of trust by the trustee. Accordingly, for liability to attach to the accessory, it was not necessary that the trustee was acting dishonestly.
>
> (2) BLT had committed a breach of trust when it used the money in the conduct of its business instead of simply deducting its commission and holding the balance until it paid the airline. By causing or permitting BLT to apply the money in a way he knew was not authorized by the trust of which BLT was trustee, the respondent had knowingly assisted in the breach of trust. Both the respondent and BLT had acted dishonestly and therefore the respondent was liable as a constructive trustee for BLT's default in its payment to the airline.

[48] Indeed D1a and D1b do not have to worry that D2 would come back in the future to claim back the two apartments for D2 would have to set aside the judgment that may be entered against him in his absence. Really D1a and D1b would have more cause to worry if their stand is that they are holding the apartments in trust for D2 if they have failed to give evidence in the witness box of that fact assuming for a moment that D2 had not gone missing to evade the plaintiff's claim but that he was gallivanting round the world in search of adventure!

[49] By failing to transfer back the two apartments to the plaintiff when they have not paid the purchase price for it and when they have not given any evidence that they hold the apartments in trust for D2 and when D2 has not appeared to defend the plaintiff's claim against him, I am constrained to hold that D1a and D1b are liable as constructive trustees of the two apartments and an order shall lie that they do transfer back the two apartments to the plaintiff.

[50] I shall deal with the ancillary orders later but right now, I must address the problem created by D1a and D1b in subsequently charging the unit G15 to the bank and the position of the bank vis-a-vis the plaintiff.

Whether the bank has an indefeasible charge over apartment G15 in the circumstance of the case

[51] The plaintiff's contention was that the officers of the bank who came to testify were low-ranking officers and as such an adverse inference should be drawn against the bank. With respect I cannot agree. As pointed out by learned counsel for the intervener bank, Mr Poh Choo Hoe, the two witnesses were material witnesses who had knowledge of the approval of the loan and the processing of the loan. IW1, Mr Au Yeong Tuck Fei, was the Branch Manager at the material time. He gave evidence that he had no knowledge whatsoever of the claim of the plaintiff on the unit G15. He approved the loan as a working capital together with IW2 his officer in charged of the Credit Department by the name of Mr Mogan a/l Kalianan. IW2 was the one who interviewed D1a and processed the loan. IW1 as the Branch Manager signed the loan documentation. The facilities agreement was dated 20 December 2006 and the charge dated 12 December 2006. Both did not know of the dispute between the plaintiff and the defendants. Both D1a and D1b became registered owners of G15 on 20 November 2006. On 22 November 2006 at the request of the first defendants, the bank had granted a credit facility to them for working capital purpose.

[52] In fact the dispute did not arise until March 2007 when the plaintiff approached D2 to request for a transfer back of the two apartments to her from D1a. If the transfer back to the plaintiff had been effected then and the charge fully discharged, there would have been no problem at all. There is no evidence whatsoever that the bank knew about the fraud much less be a party to conspiracy to defraud the plaintiff. In fact both the witnesses of the bank do not know and have no dealings with the plaintiff. There was nothing to suggest that D1a and D1b were trustees as they were not so registered against the title to unit G15.

[53] The banker's charge over the apartment was registered on 28 December 2006 whereas the plaintiff's private caveat over the apartment was entered only on 8 October 2009. D1a and D1b have declared by way of a statutory declaration dated 12 December 2006 when applying for a loan that the purpose of the said loan was for working capital. There was no caveat lodged by the plaintiff at the material time when a search was done by the bank's solicitors to ensure that the apartment concerned was free from all encumbrances and caveats when a charge was to be created in favour of the bank.

[54] That being the case the bank as a chargee is entitled to the protection afforded them under s 340(1) of the National Land Code ('NLC') in the absence of fraud to which the bank was privy under s 340(2)(a) of the NLC. They have parted with the loan to first defendants and have paid valuable

consideration for the charge created. I am more than satisfied that the bank is a bona fide purchaser for valuable consideration. Whilst the continuing refusal of D1a and D1b to transfer the apartment back to the plaintiff is fraudulent and the transfer of the apartment to them from the vendor ought to be set aside in favour of the plaintiff, yet the bank's title is indefeasible.

[55] In *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 the reason the charge in that case was set aside was because the chargee bank was an immediate holder of interest in a case where the charge was created through a forgery under s 340(2)(b) of the NLC. Hence the Federal Court held that since the chargee bank was an immediate holder of interest, the chargee Bank in that case could not avail itself of the proviso to s 340(3) of the NLC.

[56] However the Federal Court in *Tan Ying Hong*'s went on to affirm the position of the law with respect to chargee banks that are subsequent holders of interest in that they can avail themselves of the proviso to s 340(3) of the NLC. Section 340 of the NLC is reproduced here in full for its full terms and effects:

> Section 340 Registration to confer indefeasible title or interest, except in certain circumstances.
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be *indefeasible*.
>
> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of *fraud or misrepresentation* to which the person or body, or any agent of the person or body, *was a party or privy*; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> *Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser*. (Emphasis added.)

[57] In our case, whether the bank is the holder of an immediate interest who was not a party or privy to the fraud of the first defendants or that the bank is a subsequent holder of interest, the result is the same. It was argued by the bank's counsel that the bank is a subsequent holder of interest for the reason that the subject land was first transferred to the first defendants and thereafter the first defendants charged it to the bank. D1a knew or ought to have known that she was holding the subject land in trust for the plaintiff but chose to ignore it altogether and in fact took advantage of it by using it as a security for a charge without the knowledge and consent of the plaintiff. Worse still, when the plaintiff requested for the subject land to be transferred back to her she refused. The transfer of the subject land to the first defendants ought to be set aside as it is tainted with fraud against the plaintiff who paid for the full purchase price on the understanding that the transfer to D1a was only until the plaintiff could obtain her visa under MM2H as that was what was told her by D2 and which representation was later found to be false.

[58] However the first defendants have subsequent to their becoming owners, charged the subject land to the bank. The bank here may be said to have come within the meaning of a 'purchaser in good faith and for valuable consideration'. In the proviso to s 340(3) of the NLC. Section 5 of the NLC defines 'purchaser' as a person or body who in good faith and for valuable consideration acquires title to, or any interest in land. I agree with learned counsel for the bank that the term 'purchaser' in the proviso is not limited to the person or body that has acquired title to the subject land but extends to those taking an interest in the land, eg, a lessee or a chargee (the intervener bank in the present case).

[59] The facts of this case are not too dissimilar to that of *OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 MLJ 511. While in the present case the first transfer was effected fraudulently, in *OCBC*'s case it was effected through forgery. In both cases a charge was subsequently created in favour of a bank. That case was where one Ng See Chow (who was the registered owner of the subject property) was granted credit facility by OCBC Bank (M) Bhd ('OCBC'). Ng See Chow then charged the subject property to OCBC as security for repayment of the said credit facility. Subsequently, one Ng Kim Hwa claimed to be the true owner of the subject property and contended that Ng See Chow obtained his title by forgery. Ng Kim Hwa applied to set aside the title of Ng See Chow to the subject property and the application was allowed by the High Court and affirmed by the Court of Appeal.

[60] The Federal Court had occasion when deciding *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 at p 13; [2010] 2 CLJ 269 at p 286 to correct

the error in the decision of Court of Appeal in *OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 MLJ 511 as follows:

> [26] … On the facts of that case we agree that the title of Ng See Chow is defeasible under s 340(2) of the NLC as he obtained his title through a forged instrument. However, we are of the opinion that the appellant bank, *being the holder of subsequent interest in the land is protected by the proviso to* s 340(3) of the National Land Code. For that reason, we are of the view that the finding of Court of Appeal in that case is to that extend flawed. (Emphasis added.)

[61] The position of a purchaser in good faith and for valuable consideration was explained in *Puspavathy a/p Thaveethu v Majlis Perbandaran Klang & Ors and other appeals* [2008] 6 MLJ 672 at p 684 by the Court of Appeal through His Lordship Richard Malanjum JCA (now CJSS) as follows:

> [41] … The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him is excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, *they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said land*. Thus, *being a purchaser in good faith and for valuable consideration* having paid within the stipulated time the balance of the purchase price arising from the public auction sale, the second intervener had acquired an indefeasible title or interest to the said land upon being registered as the registered proprietor. (Emphasis added.)

[62] The plaintiff cannot prove fraud against the intervener bank by inference or imputation because of certain things done or not done. Learned counsel for the plaintiff, Miss Lucia Minta harped on the fact that there was no prior valuation report was obtained before the loan was approved. I can accept the evidence of IW1 the then Branch Manager Mr Au Yeong that where they know the market value of the property there was no need for a valuation report. The loan was only for a RM184,000 and any additional costs of the valuation report would have to be passed down to the borrower. At any rate the purchase price was about RM205,000. Further the fact that the bank had not requested the first defendants to submit a cash-flow report of their business cannot in any way be equated with conspiracy on the part of the bank to defraud the plaintiff. There is no benefit the bank would derive and every possibility of the charge being set aside.

[63] It would be apposite to repeat the words of the Court of Appeal in *Teh Cheng Choo v Malayan Banking Berhad* [2009] 5 CLJ 463 at 469–470 speaking through His Lordship Hamid Embong JCA (now FCJ) when arriving at a similar finding of facts on the part of the bank:

> [22] The learned trial judge also considered the evidence was found in the

appellant's affidavit supporting her OM. Her Ladyship concluded that although there were references to fraud, cheating and misrepresentations, these were allegations made against the D1 and not Maybank. We are in agreement with the trial judge's finding that the appellant had failed to establish that Maybank was a party or privy to the alleged cheating or fraud or had any notice of the alleged fraud …

[27] Since the sole question was the defeasibility of Maybank's title under s 340(2)(a) NLC, *the learned judge had correctly determined it pursuant to the proviso of subsection (3) ie, that Maybank now stood as a bona fide purchaser whose title cannot now be impugned*. The question of deferred indefeasibility of the title was thus also not in issue. (Emphasis added.)

Whether the plaintiff can still be registered owner of the apartment G15 subject to the charge in favour of the bank

[64] At first blush as the interest of the bank is indefeasible, it would appear that nothing can be done which would result in compromising the charge of the bank. However the first defendants cannot be allowed to profit from their wrongs in that as the charge is indefeasible, they might still deprive the plaintiff of her rightful title by one day fully discharging the charge and obtain yet an indefeasible title to the apartment. That would be to add insult to injury. What the bank has acquired is only an interest over the apartment and not the title to the apartment G 15.

[65] A more appropriate order to explore would be to order the first defendants to transfer apartment G15 to the plaintiff but subject to the charge to the bank. Alternatively the plaintiff can be given the option to redeem the apartment and the amount so incurred shall be deemed as judgment entered by the plaintiff against the first defendants.

[66] This anomaly was appreciated by the High Court in *Owe Then Kooi v Au Thiam Seng & Anor Development & Commercial Bank Bhd v Au Thin Chai & Ors (Owe Then Kooi, intervener)* [1990] 1 MLJ 234 at 239, where His Lordship Abdul Malek J (as he then was) wrestled with the issue as follows:

I am inclined to hold that the proviso to sub-s (3) eliminates the necessity of the purchaser in good faith and for valuable consideration applying to set aside the defeasibility and it follows that from the facts of the present case, the title to the property had reverted to the plaintiff but the interest remains vested in the second defendant. This would mean that I should have granted order in terms for the second defendant's application as plaintiff in the originating summons to foreclose the property. I may have been in error here but, to my mind, *it would be disastrous to find a subsequent innocent chargee to have a better right than the defrauded registered proprietor with the title who was not party or privy to any of the situations that made the*

title or interest defeasible in the light of *Quah Hong Lian Neo* 's case; [1936] MLJ 203. As between them, even if the charge is held to be valid, the position would be that the chargee acquired only an interest in and not a title to the land and the registered proprietor of the charged land can in fact further sell the land to a third party who will take it subject to the registered lease or charge. (Emphasis added.)

THE PRONOUNCEMENT

[67] In the upshot this court held that the transfer of the two units of apartments in G15 and G16 to the first defendants and the refusal to now transfer back to plaintiff was in fraudulent breach of the trust and so this court made the necessary orders with respect to prayer 13.1(a) (i) for a declaration that the plaintiff is owner of G15 and prayer 13.1(a)(ii) that plaintiff is the owner of G16, and also prayer 13.1(b) (i) and (ii) vacant possession of G15 and G 16.

[68] Consequential orders were made with respect to prayer 13.1(b) (iii) for an order that the first defendants sign a valid Transfer Form 14A and other documents with respect to apartments G15 and G16 in favour of the plaintiff failing which the senior assistant registrar ('SAR') of the Ipoh High Court, Perak shall be authorised to sign on the first defendants' behalf.

[69] The consequential order with respect to prayer 13.1(b) (iv) for an order that the first defendants do deliver the original Strata Titles No PN 3876/M34/4/63 and PN 3876/M34/4/64 within seven days of the order herein together with supportive documents including the original sale and purchase agreements and charge documents is subject always to the charge to Public Bank Bhd.

[70] I also granted prayer 13.1(c) for an injunction to restrain the first defendants from transferring, charging or in any way of dealing with the said apartments.

[71] There is an excess of RM178,000 which the plaintiff has proved that she had paid D2 and so judgment was entered against D2 for the sum of RM178,000 with interest at 5%pa from date of writ to realisation.

[72] I then considered the assessment of damages between the plaintiff and the first defendants. For Unit 15, as the plaintiff was staying there all along and no evidence that she had suffered any loss other than not been able to charge the unit which D1 had charged to the bank, I had assessed damages at RM5,000.

[73] As for Unit G16, she had been kept out since 21 May 2007 till now for almost six years. Going by a return of 5%pa on the apartment which is not unreasonable, it worked out to about RM 10,000 per year and so I assessed damages at RM60,000 as the plaintiff could have let out the unit herself and earn the rental income. Interest shall run at 5%pa from date of writ till realisation.

[74] With respect to the charged unit G15, the said unit shall be transferred back by the first defendants to the plaintiff within 14 days subject to the charge and the first defendants are hereby ordered to pay to the bank the redemption sum for the unit to be so discharged. The redemption sum is currently at RM211,007.24 as at 31 December 2012 with accruing interest. The plaintiff shall be at liberty to pay this or such other redemption sum as may be accrued to get a full discharge of charge and such sum paid shall be deemed as judgment entered and enforceable against the first defendants.

[75] All legal fees, costs and expenses for the redemption and transfer back to the plaintiff of the two apartments shall be borne by the first defendants.

[76] For completeness of record, the plaintiff shall pay to Mrs Masaki Michika the sum of ¥ 4m being the contribution by her towards the purchase of the two apartments.

[77] Damages shall be assessed by SAR against D2 for fraudulent breach of trust.

[78] As for costs, after hearing submissions I had assessed as follows:

> The first defendants shall pay the sum of RM40,000 to the plaintiff. The plaintiff shall be allowed the usual judgment in default costs against D2. Further the first defendants shall pay the costs of RM20,000.00 to the intervener bank.

Plaintiff's claim allowed with costs of RM40,000 to plaintiff and RM20,000 to intervener bank.

Reported by Kohila Nesan